NO. 18643

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALLACE LEROY SCHIERS,

Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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LIST OF AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus by a state prisoner. 28 U.S.C.A. § 2241(a), (c)(3). Such a petition was filed on July 13, 1962. (Fed. Tr. p. 2.)[1/]

This court has jurisdiction to review on appeal a final order of a district judge denying a writ when a certificate of probable cause has been granted. 28 U.S.C.A.

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[1] All references to the Clerk's Transcript on appeal in this Court will be designated as "Fed. Tr." The state record will be designated as "Rep. Tr." and "Cl. Tr."

§ 2253. On July 1, 1963 an order was entered denying a petition for the writ of habeas corpus, due to the failure to present a meritorious federal question. (Fed. Tr. pp. 255-256.) A notice of appeal was filed on July 2, 1963. (Fed. Tr. pp. 260-262.) A certificate of probable cause was entered on the same date. (Fed. Tr. p. 285.)

STATEMENT OF THE CASE

An information filed by the District Attorney of Los Angeles County on March 15, 1957 charged petitioner with the murder of his wife. (Cl. Tr. p. 1.) A jury found petitioner guilty of murder in the second degree. (Cl. Tr. pp. 6-14.) A motion for new trial was denied and petitioner was sentenced to the state prison for the term prescribed by law. (Cl. Tr. p. 16.)

The judgment was affirmed May 12, 1958 on appeal by the District Court of Appeal, 2d Appellate District, Division Three. (The opinion is reported in People v. Schiers, 160 Cal.App.2d 364, 324 P.2d 981.) A petition for hearing was denied by the State Supreme Court on July 11, 1958. Three of the seven justices were of the opinion the hearing should be granted. Shiers, p. 378. Subsequently, on October 19, 1960, petitioner made a motion in the District Court of Appeal to recall the remittitur.

No petition for certiorari with the United States Supreme Court has been filed. (Fed. Tr. p. 17.)

Petitioner does not claim that a petition for habeas corpus has been filed in the state courts.

STATEMENT OF FACTS

A summary of the state reporter's transcript is contained in the opinion of the State District Court of Appeal. See People v. Schiers, supra, 160 Cal.App.2d 364, 367-371, 324 P.2d 981.

SUMMARY OF APPELLANT'S CONTENTIONS

The arguments advanced by petitioner appear to fall in the following categories:

1. He was held in custody seven days before arraignment;

2. Counsel was ineffective;

3. There were secret trial proceedings, and hence a denial of public trial;

4. There was false testimony and suppression of evidence;

5. There was deliberate introduction of lie detector testimony;

6. The jury was erroneously instructed on accusatory statements;

7. Photographic evidence important in petitioner's defense was withheld from the jury.

After appellant filed the petition for habeas corpus in propria persona, counsel was appointed to assist him and an amendment to the petition was filed as well as a memorandum of points and authorities in opposition to the motion to dismiss. In part these support contentions made in the original petition and, in part, new points were added or developed. (Fed. Tr. p. 224, et seq.) These follow:

1. There was a failure to appoint counsel on appeal;

2. Petitioner was denied the right to appear at the oral argument;

3. He was denied the right to correct the record;

4. Petitioner was not notified of the affirmance of the judgment on time.

SUMMARY OF APPELLEES' ARGUMENTS

Appellees controvert the foregoing claims of error and contend that the petition for a writ of habeas corpus was properly dismissed.

ARGUMENT

I

THERE WAS NO PREJUDICE BASED ON AN ILLEGAL ARRAIGNMENT

The petition alleges that appellant was illegally detained for seven days before arraignment. (Fed. Tr. p. 19.)

This contention was not raised at the trial nor could it be reviewed by appeal.

People v. Pollart, 208 Cal.App.2d 793, 795; 25 Cal. Rptr. 678;

People v. Finley, 174 Cal.App.2d 206, 211; 344 P.2d 614.

The reliance on the McNabb-Mallory rule -- see McNabb v. United States, 318 U.S. 332, 343, 63 S.Ct. 608, 87 L.Ed. 819; Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479 -- was modified subsequently by appointed counsel, conceding that the mere failure to comply with local statutes does not violate a federal constitutional right (Fed. Tr. p. 229), but contending that the lie detector evidence induced prejudice.

While California has been critical of officers who transgress Section 825 of the California Penal Code -- see People v. Grace, 166 Cal.App.2d 68, 78-79, 332 P.2d 811; -- California has not adopted the McNabb-Mallory rule

and adheres to the rule expressed in Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929. Unless some prejudice can be shown such as the taking of admissions or confessions, California follows the rule that there is no unfair trial. People v. Van Eyk, 56 Cal.2d 471, 480, 15 Cal.Rptr. 150.

Appointed counsel suggested that the prosecution secured the lie detector evidence and pictures showing marks on petitioner's hands. We contend that the lie detector evidence was excluded by the court and the jury was admonished to disregard it. The District Court of Appeal held that it was error to relate this to the jury but not prejudicial. The fact that it may have been obtained during an illegal detention does not alter this conclusion. The photos of appellant's body and hands are not shown to have been taken during an illegal portion of the detention. (See Rep. Tr. p. 117.) The length of the detention would not make the pictures untrustworthy and since the benzidine tests were taken the first day and the evidence of blood is perishable, it is probable that the photographs were taken before a prolonged detention.

We note in passing that appellant in his petition regards the color slides as important to his defense and even complains of the purported failure to

put some of them in evidence. Moreover his testimony at the trial conceded what the color slides showed, as will be demonstrated.

We note too that all we have before us are petitioner's statements, and in places he speaks of having an attorney during this period. (Fed. Tr. pp. 20, 269-270.)

There has never been a hearing in the state courts to determine the truth of these allegations. Petitioner has the presently existing remedy of habeas corpus in the state court. Accordingly, this court should in comity decline to consider the matter.

II

PETITIONER WAS ABLY REPRESENTED BY COUNSEL AT THE TRIAL

Petitioner contends that Jerry Giesler and Rex Eagen, his lawyers at the trial, were incompetent for failing to raise the question of the illegal arraignment. (Fed. Tr. pp. 17-20.) The record does not disclose why they failed to raise the point. It may be that they had studied the claim and concluded, as we have, that it is meritless.

Petitioner also contends that his lawyer blacked out during the trial. Cf. People v. Davis, 48 Cal.2d 241,

252-258, 309 P.2d 1. Apparently the attorney struck his head diving into a swimming pool and claimed to suffer from the effects of the blow during the trial.

The point was fully considered on appeal and we adopt the opinion's conclusion and reasoning as our position.

See People v. Schiers, 160 Cal.App.2d 364, 376-378, 324 P.2d 981.

Appellant objects to the continuance given to counsel to recuperate (Fed. Tr. pp. 37-38), but this claim requires no comment.

Petitioner also complains of false representations by defense counsel as to the admission of certain photographic evidence. The claim is that the defense attorney told petitioner certain slides were admitted but they were not. We shall have occasion to discuss the slides at a later point and will present our reasons then to show that petitioner suffered no prejudice.

III

APPELLANT WAS NOT PREJUDICED BY ANY SECRET TRIAL COURT PROCEEDINGS

Petitioner sets forth an extended attack at trial court proceedings purportedly held in his absence and in judicial chambers. (Fed. Tr. pp. 27-32.)

It appears that there were some proceedings to exonerate bail and there was some preliminary discussion not in the record. (Rep. Tr. A-1, in July 2, 1957 at 9:45 a.m.; Fed. Tr. p. 54.) Appellant wants these proceedings to have been held before the jury. (Fed. Tr. p. 23, lines 29-30.)

There were other proceedings to pass on the exhibits in the presence of petitioner and his counsel but not the jury. (Rep. Tr. p. 342.) There were also some prelimingary discussion about the inadmissibility of the lie detector evidence before the jury was brought in and instructed. (Rep. Tr. p. 299.)

Passing on the exhibits and instructions before giving them to the jury is a well defined and sanctioned legal procedure, designed to protect a defendant from prejudice. We deem argument to be unnecessary. See People v. Gotham, 185 Cal.App.2d 47, 57, 8 Cal.Rptr. 20.

As to the exoneration of bail, this had nothing to do with the determination of guilt or innocence. The jury was not present. We may well say here what was said in People v. Ang, 204 Cal.App.2d 553, 556, 22 Cal.Rptr. 455:

> ". . . The incident in question was no part of the defendant's trial nor of the criminal proceedings to which he was a party; involved merely an

administrative function of the trial judge; and did not come within either the letter or the spirit of the law which requires his presence. . . ."

Snyder v. Massachusetts, 291 U.S. 97, 106-108, 54 S.Ct. 330, 98 L.Ed. 674, 90 A.L.R. 575.

This analysis effectively demonstrates that petitioner was not denied a public trial.

IV

THERE WAS NO WILLFUL SUPPRESSION OF EVIDENCE OR FALSE TESTIMONY

Petitioner makes allegations of willful suppression of evidence and knowing use of false testimony, yet it is evident from the argument that these are no more than conclusionary statements and that petitioner, who was represented by counsel, has no capability of substantiating such wild claims. He refers to purported conflicts between the testimony at the preliminary and at trial but these were before the District Court and do not uphold the claim. After appointing counsel, who worked diligently on petitioner's behalf, the District Court could have concluded that no hearing was necessary as nothing could have been adduced at it by petitioner that was not already in the record.

V

THERE WAS NO PREJUDICE IN THE
LIE DETECTOR TEST DISCLOSURES

This matter has been fully considered in the District Court of Appeal's opinion, and we adopt the conclusions reached there as our own.

VI

PETITIONER WAS NOT PREJUDICED BY
THE GIVING OF INSTRUCTIONS ON
ACCUSATORY STATEMENTS

The point is summarized and decided by the State District Court of Appeal.

People v. Schiers, 160 Cal.App.2d 364, 378, 324 P.2d 981.

We adopt the position taken by the District Court of Appeal in respect to the purported error not being prejudicial and submit that there was no federal constitutional deprivation.

VII

PETITIONER WAS NOT PREJUDICED
BY THE PRESENCE OR ABSENCE OF
THE COLOR SLIDES

Petitioner tells us how his attorney had related to him that certain prosecution photographs were not admitted; that Eagen was mistaken in thinking they were;

that the jury had asked to see them and that Eagen said they were then admitted in evidence. (Fed. Tr. p. 56.)

Appellant does not complain of the possibility they were shown to the jury but rather of the possibility they were not. He notes that the opinion of the District Court of Appeal said he had marks on his hands and photos were put in. (Fed. Tr. p. 62.)

Petitioner tells us his whole defense consisted of the photographs not admitted. (Fed. Tr. pp. 100, 112.) His story is that the police had said there were negative reactions below the knees to support a story of rape of the deceased after death. (Fed. Tr. p. 103.) Appellant insists the police testified falsely about positive reactions between the waist and knees. (Fed. Tr. p. 104.)

So far as we can see it makes little or no difference what the "blood--no blood" pattern was.

Petitioner is concerned with an allegation never brought against him. (See Fed. Tr. p. 267.) No one has formally charged him with having intercourse with his wife after decease and this suggestion has not been made in support of the murder charge. A "blood--no blood" pattern showing its absence or presence below the knees was unimportant. As the charge was not made or implied in the proceedings, the absence of refutation could not

have aided petitioner. The point remains that there is strong evidence he had a lot of blood on him. His own testimony buttresses the scientific evidence:

"Q BY MR. EAGAN: How many times did he touch your body with a swab?

A At that time he merely tested my hands. He smeared this stuff on with swabs and an immediate blue streaks came onto my hands and I asked, I asked him, I said, 'What does that indicate?'

And he looked at me, didn't say anything. And then he started smearing it around further on my hands and told me that he -- he asked a question. He says, 'Do you work in a slaughter house?'

I, of course, felt that the test then must indicate blood or he wouldn't have made that remark, and I asked him again and he said, 'Yes, certainly, it indicates blood.'

Q What did you say?

A I don't remember what I said. Certainly I was surprised, and Mr. Jones stated that I said, 'My God, this places me in a horrible position.' I don't think I said that, but I could have. I don't remember what I said.

Q Do you have any explanation at all, Mr. Schiers, for the reaction to the benzidine test?

A I do not.

Q Do you know if you have come in contact with any of the substances or do you have any recollection now if you had come in contact with any of the substances Mr. Pinker said would give the same reaction?

A I do not recall, no, sir.

Q Now, after the test you were taken by Sergeant Belle and Sergeant Ortiz to the Van Nuys Station, were you?

A Yes. After the test on my hands, Mr. Jones asked me if I would go into the kitchen and take off my clothes and he wanted to test further on my body for blood. He did. He made crossmarks up and down my arms and made, I think, three or four marks on the right and left sides of my chest. They showed me blood stains in the bathroom No. 2 in the commode and in the sink. He asked me if I could explain those. I told them no." (Rep. Tr. p. 476, line 1 - p. 477, line 11.)

It is apparent from this evidence that it was appellant's testimony he had a positive benzidine reaction on his hands and over much of his body. Whether or not there were color slides introduced to corroborate appellant's story is not important. In view of appellant's

testimony we deem the statement that his fingers were saturated with blood to be a fair inference from the record.

Petitioner also complains of a statement in the record that Mr. Schiers had his fingers saturated with blood. (Fed. Tr. pp. 63-64, 213.) He claims that this was really a reference to Mrs. Schiers. Complaint is also made of a statement purportedly made by Justice Shinn at the oral argument on the motion to recall the remittitur (Fed. Tr. p. 81), referring to the benzidine test as conclusive. Petitioner tells us he would have challenged this at the trial but that tests performed by the defense indicated that blood was "the only substance known to have been available" that could do this. (Fed. Tr. p. 92.) There was no attempt to refute the idea of conclusiveness because petitioner realized such an attempt would prove futile. (Fed. Tr. pp. 93-94; cf. Fed. Tr. p. 218.)

We see no merit whatever to petitioner's allegations. They do not present even a meritorious state question.

VIII

THERE WAS NO ERROR IN
PROCEDURE ON THE APPEAL

Appointed counsel raised several claimed defects on the appeal, which we will consider in turn.

A. Failure to Appoint Counsel

At the time petitioner's appeal was processed through the California courts when counsel was requested an independent investigation was made of the record and counsel was appointed if it would benefit the appellant or the court.

People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42;
Cf. the concurring opinion of Traynor, J., in
People v. Brown, 55 Cal.2d 64, 69, 9 Cal. Rptr. 836.

Subsequently in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811, the United States Supreme Court concluded that it was necessary to have appointed counsel for indigents on appeal in preference to the former system. No request for counsel on appeal was ever made and petitioner consulted with his trial lawyers about the appeal before he proceeded in propria persona.

If it is assumed that the Douglas case will be applied retroactively (cf. Hurst v. California, ___ F.2d

___ (9th Cir. 1963), petitioner has a presently existing state remedy in that he can make a motion to recall the remittitur.

People v. Miller, 218 A.C.A. 654, 655, 32 Cal. Rptr. 396

Such a motion was made by appellant but long before the Douglas case and on different grounds.

Moreover, we take the position that if appellant desired counsel on appeal he should have requested it. He should not proceed in propria persona, as he is doing in this court, and then claim later that the appellate court is in error. In the absence of a request, there has been no denial of appointed counsel and no constitutional deprivation.

B. Appearance at Oral Argument

Petitioner contends that he was denied the right to appear at the oral argument.

There is no indication of what material appellant desired to present to the court or why he could not have submitted it in writing. It has always been recognized that production of prisoners for post-trial procedures presents an administrative burden.

Sanders v. United States, 373 U.S. 1, 20, 83 S.Ct. 1068, 10 L.Ed. 2d 148.

The purpose of seeking ostensible relief can be the trip

to court. The security problems, particularly with convicted murderers, are apparent. Appellate courts are rarely equipped to handle such problems.

See Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356, indicating that oral argument may be circumscribed on appeal for prisoners.

C. Correction of the Record

We have already analyzed this point in passing, and have concluded that appellant's requests for augmentation were as to matters that had no controlling significance.

D. Notification of Affirmance of Judgment

Petitioner claims he did not receive a copy of the opinion of the District Court of Appeal for some protracted period of time. The allegation rests solely on the strength of his own credibility. We would be reluctant to allow prisoners to create error by denying they had failed to receive legal documents from the court.

Moreover, petitioner filed a petition for hearing which was carefully reviewed, and the District Court of Appeal can be depended upon to supervise properly the work of its clerks, or even recall the remittitur if necessary.

See People v. Perry, 223 A.C.A. 503.

CONCLUSION

Petitioner attacks the handling of the matter by the Federal District Judge but there is nothing to indicate that the judge did not consider all of the petition and its amendments, as well as the state transcripts.

We submit that the District Judge made the correct decision. He allowed a hearing, and petitioner argued the matter to whatever extent he pleased.

There was no request to make a factual presentation, nor would such a factual hearing be necessary if our position is sustained. To grant a factual hearing on every charge and complaint made in the petition would require a protracted proceeding, possibly months long. There was no necessity for it under these circumstances. A factual hearing could not have served a useful function.

It is submitted that petitioner has not presented a meritorious federal question and we respectfully request that the judgment be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK K. WEBER